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No. 04-1149

IN THE
Supreme Court of the United States

ROSE ACRE FARMS, INC.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICI CURIAE* DEFENDERS OF PROPERTY RIGHTS, IOWA POULTRY ASSOCIATION, NEW ENGLAND LEGAL FOUNDATION, AND UNITED EGG PRODUCERS IN SUPPORT OF THE PETITION

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BRIEF OF DEFENDERS OF PROPERTY RIGHTS, IOWA POULTRY ASSOCIATION, NEW ENGLAND LEGAL FOUNDATION, AND UNITED EGG PRODUCERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Defenders of Property Rights ("Defenders"), **Iowa Poultry Association** ("Iowa Poultry"), **New England Legal Foundation** ("NELF"), and **United Egg Producers** ("UEP"), as *amici curiae*, respectfully submit this brief in support of the petition.[1]

INTEREST OF THE AMICI CURIAE

Defenders is the only national legal defense foundation dedicated exclusively to protecting private property rights. Based in Washington, D.C., Defenders was founded as a non-profit, public interest legal foundation in 1991. Its mission is to protect vigorously those rights considered essential by the Framers of the Constitution, and to promote a better understanding of the relationship between private property rights and individual liberty.

Defenders engages in litigation across the country on behalf of its members and the public interest to prevent government incursion into protections guaranteed by the Bill of Rights. Defenders participated in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517 (2005); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001);

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amici curiae* and their members, made a monetary contribution to the preparation or submission of this brief. All parties have consented to this filing in letters on file with the Office of the Clerk of this Court.

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999); *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Bennett v. Spear*, 520 U.S. 154 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and *Lucas v. South Carolina Costal Council*, 505 U.S. 1003 (1992).

Iowa Poultry is a voluntary statewide trade association that brings together all poultry-associated industries, businesses, and farms. Iowa Poultry is closely connected to the Iowa Egg Council as well as numerous other egg and poultry associations and boards across the country. These entities share the mission to promote and educate the public about the poultry and egg industries.

NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States. NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g.*, *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517 (2005); *Comm'r of Internal Revenue v. Banks*, 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo*, 533 U.S. at 606; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332 (1st Cir. 2000); *Bessette v. Avco Fin. Servs.*, 230 F.3d 439 (1st Cir. 2000).

UEP is a national organization representing members of the egg industry, including Petitioner Rose Acre Farms, in every state. Its members include table egg farmers, breeder flock owners, hatchery owners, pullet growers, contract egg producers, and certain farm cooperatives. UEP has a membership base comprising of approximately 75 percent of all egg-type chickens in the United States, and its leadership has been a driving force in the egg industry. The outcome of this case will directly affect a substantial number of its members.

Amici have a strong interest in the issue raised by Question 1 of the Petition -- the need for clarification of the important "denominator question" in Fifth Amendment[2] regulatory takings jurisprudence. Because the court's determination of the denominator (or, as it is sometimes called, the "relevant parcel"), is often outcome-determinative, this issue goes to the heart of the Constitution's "bar [on the] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Thus, *amici* have a keen interest in advocating predictable and fair standards for judicial determination of the takings denominator.

SUMMARY OF ARGUMENT

1. There is an urgent need for this Court to clarify the standards by which "the difficult, persisting question of what is the proper denominator in the takings fraction" should be determined. *Palazzolo*, 553 U.S. at 631 In the absence of clear guidance from this Court, the lower courts have developed at least three wholly different -- and

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[2] "[N]or shall private property be taken for public use, without just compensation." U.S. Amend. V.

fundamentally inconsistent -- approaches to these critical issues, characterized by the Petition as the Unity of Ownership, the Reasonable Expectation, and the Government Conduct schools of analysis. And because a court's evaluation of a regulation's economic impact on the claimant depends on its identification of the denominator, the threshold decision as to the standards by which the denominator should be determined often controls the outcome of the case. The multiplicity of inconsistent but outcome-determinative standards has thus led to a situation in which a claimant's ability to obtain compensation for government action that affects his property now depends on the venue available to him to seek relief. The rights of American citizens under the Fifth Amendment should not be left in this posture.

2. This case is a particularly appropriate vehicle for this Court to address the denominator/parcel issue because it arises in the context of a case involving personal property -- an area in which regulatory takings claims are arising with increasing frequency. Although this Court has recently decided a number of takings cases involving such diverse types of personal property as financial assets, intellectual property, and artifacts, in none of those cases has it ever addressed the denominator/parcel issue -- or even indicated whether the concept of a "parcel" is applicable at all in the personal property context. In such cases, the lower courts thus have even less guidance than in cases involving real estate -- although determination of the denominator is, if anything, more complex and the need for clear standards more acute.

In this case the denominator issue has been thoroughly explored in the courts below, and the divergent results reached by the Court of Federal Claims and the Federal Circuit turn largely on their differing views as to the

analytical approach by which the parcel/denominator issue should be determined in the personal property context. This obvious confusion on the part of courts with extensive experience in regulatory takings cases highlights the need for prompt consideration by this Court.

ARGUMENT

I. CLARIFICATION OF THE DENOMINATOR/ RELEVANT PARCEL STANDARD BY THIS COURT IS URGENTLY NEEDED.

There is an urgent need for this Court to decide the issue that it noted, but did not decide, in its recent decision in *Palazzolo v. Rhode Island* -- "the difficult, persisting question of what is the proper denominator in the takings fraction." 533 U.S. at 631. As *Palazzolo* recognized, there is tension even in this Court's own decisions with respect to this issue: "Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole . . . but we have at times expressed discomfort with the logic of this rule . . ." *Id.* (citations omitted). And the lower courts, in deciding regulatory takings cases, have split into at least three different camps -- with wildly differing results -- in their approach to determining the denominator or "parcel." Given the frequency with which the denominator issue arises in both the federal and the state courts, and the differing standards currently applied by the lower courts in resolving it, there is a clear need for further guidance from this Court.

Although typically couched in technical language, the denominator question is by no means an academic issue. To the contrary, the resolution of the appropriate denominator is often the issue on which the outcome of a takings claim turns. If the denominator is defined as identical to the size of the affected property (i.e., the numerator), this may establish a total taking that can entitle the property owner to automatic

compensation without facing the uncertain *Penn Central* balancing factors.[3] *See Lucas*, 505 U.S. at 1003. Alternatively, should a court conduct a *Penn Central* analysis, defining the denominator determines the economic impact of a regulation -- one of the three most critical factors identified in *Penn Central* as relevant to determining whether a regulatory taking has occurred.

In *Penn Central*, the Court explained that in looking at the affected property, one "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." 438 U.S. at 130. Instead, a court should look at the regulation's effect on the "parcel as a whole" in calculating the economic impact on a property owner. *Id.* at 131. However, a quarter-century after *Penn Central* announced this broad principle, this Court and the lower courts are still struggling to define how the "parcel" or the denominator for regulatory takings analysis should be measured.

In subsequent years, this Court itself has stated that the "uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court." *Lucas*, 505 U.S. at 1016, n.7. As an example of this inconsistency, the Court compared two of its own decisions: *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922), and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497-502 (1987). *Lucas*, 505 U.S. at 1015-16. In *Mahon*, a law restricting subsurface extraction of coal was held to constitute a taking, while under a nearly identical law in *Keystone*, it did not. The deciding factor in both cases was how the Court calculated the takings

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[3] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

denominator. Nevertheless, the Court avoided "this difficulty" of clarifying the denominator issue in *Lucas* because the nature of the claim raised and the factual findings of the lower court made its resolution unnecessary. *Id.* After *Lucas*, commentators noted that the denominator problem remained a lingering and important problem that needed the Court's attention. *See, e.g.,* Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 Rutgers L.J. 663, 725 (1996) (observing that "[a]lthough the Supreme Court has repeatedly recognized the existence of [the denominator] problem . . . it has yet to set forth any guidelines for making this important and often dispositive determination.").

Moreover, almost ten years later, in *Palazzolo*, this Court again recognized "the difficult, persisting question of what is the proper denominator in the takings fraction," but did not explore the issue because petitioner had not raised the argument in the state courts or in the petition for certiorari. 533 U.S. at 631. Again, commentators noted the importance of this still-unresolved issue. *See, e.g.,* Benjamin Allee, Note, *Drawing the Line in Regulatory Takings Law: How a Benefits Fraction Supports the Fee Simple Approach to the Denominator Problem*, 70 Fordham L. Rev. 1957, 1960 (2002) ("[t]he resolution of the denominator problem [still] promises a far-reaching impact on regulatory takings jurisprudence.").

In the absence of clarification from this Court, the lower courts faced with resolving the denominator issue have -- not surprisingly -- failed to reach a consensus as to the standards or criteria by which the denominator should be measured. As the Petition explains, (Pet. Br. at 11-13), three legal standards have been developed and applied by the lower courts for resolving the issue -- (1) Unity of Ownership, which measures the denominator by all the contiguous or nearby property owned by the claimant; (2) Reasonable Expectation, which utilizes state property law to determine the investor's

reasonable expectations as to the division of the property; and (3) Government Conduct, which measures the denominator by the government regulation itself.[4] In many instances, the outcome of the case has turned on which standard is selected and applied by the court for this determination. Simply stated, as a result of the inconsistent legal frameworks the lower courts have used to determine the denominator, a property owner may be found to have suffered a regulatory taking in one state and awarded compensation, while a similarly-situated property owner in a different state may be denied relief entirely -- all based on the different approaches employed in determining the "relevant parcel."

For example, in *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338 (Fed. Cir. 2004) *cert. denied* 73 U.S.L.W. 3513 (U.S. Feb. 28, 2005), the Federal Circuit considered a claim arising from a federal agency's designation of certain land subject to plaintiff's mining leases as unsuitable for mining. The Court analyzed the claim under the Reasonable Expectations concept and, on that basis, defined the "relevant parcel" for the takings analysis as two leases bought by the claimant as part of a discrete mining unit. *Id.* at 1346. The result of this broad Reasonable Expectations definition was that the claimant was denied relief altogether, both as a categorical taking and under the *Penn Central* analysis. *Id.* at 1346, 1351.

In contrast, the Fifth Circuit in *Vulcan Materials Co. v. City of Tehuacana*, 369 F.3d 882 (5th Cir. 2004), found a

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[4] See John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535, 1544 (1994) (describing different schools of analysis of relevant parcel question.)

categorical taking in similar circumstances based on its use of the Government Conduct approach to defining the "relevant parcel." In *Vulcan*, a city ordinance forbidding quarrying or blasting operations within the city limits shut down plaintiff's quarry operations within the city. *Id.* at 885. However, the plaintiff had other quarry operations outside the city limits which were unaffected by the ordinance. The Fifth Circuit's use of the "Government Conduct" approach to define the "relevant parcel" resulted in a conclusion that the takings denominator should include only the property interests subject to the ordinance. Because the ordinance wholly prohibited the plaintiff's quarrying right within the city, the court concluded that there had been a categorical taking that left the plaintiff's "leasehold interest valueless." *Id.* at 891-92. Had the court instead adopted a Reasonable Expectation or Unity of Ownership approach, it would have reached the opposite result.

In fact, the determination of how to define the "relevant parcel" has led to inconsistent results within the Federal Circuit itself. In *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893, 895 (Fed. Cir. 1986), *vacated on other grounds*, 18 F.3d 1560 (Fed. Cir. 1994), a property owner purchased 1,560 acres of wetland property in Florida to extract the underlying limestone. However, after purchasing the property, the Army Corps of Engineers ("Corps") passed regulations that required owners to obtain a permit before engaging in dredging or filling activities on certain types of land. *Id.* at 895. The owner sought a permit to mine 98 acres for a period of three years, but after consideration, the Corps denied the request. *Id.* In analyzing whether the government had taken the owner's property, the court looked to the 98 acres that were the subject of the regulation (Government Conduct) and not the 1,560 acres that the plaintiff owned. *Id.* at 904.

In contrast, in *Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1363 (Fed. Cir. 1999), a landowner sought to dredge and fill approximately nine acres near a lake and sought a permit from the Corps to commence the dredging. The Corps ultimately rejected the permit application. *Id.* at 1363. In its regulatory takings analysis, the Federal Circuit rejected the plaintiff's theory that the lake bottom acreage and the upland parcel at issue constituted separate portions of land. *Id.* at 1365. Instead, the court, following a Reasonable Expectation approach, looked at the economic expectations of the property owner and its treatment of the property as a single integrated unit to conclude that both portions of the property should be included in the "relevant parcel" denominator. *Id.* Therefore, the court found substantial value remaining in the land and no regulatory taking. *Id.* at 1366.

Similarly, cases from the Supreme Courts of Wisconsin and Ohio highlight the inconsistencies in property protection under the current regulatory takings jurisprudence in the state courts. In Wisconsin, a landowner sued a municipality for its decision to rezone and reclassify some of his real property as a wetland conservancy that could not be developed. *Zealy v. City of Waukesha*, 548 N.W.2d 528 (Wis. 1996). Wisconsin's lower appellate court had applied the "anticipated investment opportunities" (Reasonable Expectation) standard to determine the "relevant parcel" and, on that basis, had found a compensable taking. *Id.* at 532. However, the Wisconsin Supreme Court rejected the reasonable expectation mode of analysis, adopted the Unity of Ownership approach, found a much larger parcel to exist,

and ultimately found no categorical or partial taking. *Id.* at 532-35.[5]

On the other hand, in *State ex rel. R.T.G., Inc. v. Ohio*, 780 N.E.2d 998, 1009 (Ohio 2002), the Ohio Supreme Court in similar circumstances endorsed the Reasonable Expectation approach that the Wisconsin Supreme Court had rejected and, on that basis, found a categorical taking of plaintiff's coal development rights. In *R.T.G.*, the State of Ohio had determined that a coal mining company's surface mining could adversely affect the aquifer that supplied water to a village and thus designated the acres of land that affected the aquifer as unfit for mining. *Id.* at 1001. The Ohio Supreme Court rejected Ohio's argument that the "relevant parcel" definition should include all of the coal company's contiguous property, and instead, looked to the "claimant's investment-backed expectations." *Id.* at 1009. After considering the economies of scale that would prevent the coal company from mining the minimal coal outside of the regulated area, the Ohio Supreme Court found a compensable categorical regulatory taking. *Id.* at 1011.[6]

These representative cases from both the lower federal courts and the state courts illustrate the way in which the inconsistent legal frameworks used for calculating the

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[5] *See also Animas Valley Sand & Gravel, Inc., v. Bd. of County Comm'rs*, 38 P.3d 59, 69 (Colo. 2001), where the Supreme Court of Colorado similarly found no comparable taking after adopting a Unity of Ownership approach.

[6] The Ohio Supreme Court cited with approval a decision of the Pennsylvania Supreme Court, *Machipongo Land & Coal Co. v. Dep't of Environmental Protection*, 799 A.2d 751, 768-69 (Pa. 2002), which looked at multiple factors including the owner's investment-backed expectations to determine the "relevant parcel."

"relevant parcel," or denominator have led to dramatically different results for similarly situated property owners. This situation is particularly untenable where, as here, rights guaranteed by our Constitution are involved. A claimant's ability to obtain compensation for the effect of government regulation on his property should not turn on the fortuity of the State or Circuit in which he or his property happens to be located.

In attempting to apply this Court's relevant parcel/denominator jurisprudence, a state appellate court in Illinois recently observed, in obvious frustration, that "at this juncture . . . the Supreme Court has yet to define the factors used to determine the 'relevant parcel' for takings purposes, which is commonly referred to as the 'denominator problem.'" *LaSalle Nat'l Bank v. City of Highland Park*, 799 N.E.2d 781, 793 (Ill. App. Ct. 2003). It is time for this Court to take that step. By establishing clear guidelines and criteria for the courts to follow in addressing the denominator issue in takings cases, the Court would provide much needed consistency and fairness for the Nation's property owners.

II. THIS CASE IS AN EXCELLENT VEHICLE FOR ADDRESSING THE RELEVANT PARCEL/DENOMINATOR ISSUE

For several reasons, this case provides an excellent vehicle for this Court to address the full ramifications of the denominator determination and to provide much-needed guidance to the lower courts. First, unlike *Palazzolo*, where the lower courts had not even addressed the denominator issue (because of the petitioner's failure to raise it), this case comes to this Court with a full exploration of the issue by both the trial court and the circuit court. Indeed, their different conclusions as to the economic impact of the Department of Agriculture's regulations turned largely on the fact that the Court of Federal Claims applied a Government Conduct approach and the Federal Circuit applied a Unity of

Ownership approach in determining what the appropriate denominator should be. The denominator issue has thus been thoroughly aired below and is now in a posture appropriate for resolution by this Court.

Second, this case is particularly appropriate for review by this Court because it arises from the Federal Circuit -- the court with authority over all cases alleging a taking by the federal government. The sheer volume of claims affected by a decision of the Federal Circuit on such an important issue as the denominator question is thus far larger than those directly affected by any state court or any other Federal Court of Appeals. Moreover, because of its preeminent role in federal takings cases, the decision of the Federal Circuit can be expected to have a disproportionate influence on other federal courts hearing claims arising under state law, as well as on the state courts. Thus, it is particularly important that a decision of the Federal Circuit on an issue as significant as this not be left unreviewed by this Court.

Third, this case is an exemplar of the type of regulatory takings case that is arising with increasing frequency in both the state and federal courts -- one involving personal property, rather than the real property addressed by this Court's earlier, limited discussions of the denominator issue. Indeed, one of the most notable features of this Court's recent takings jurisprudence is the fact that, while at least five of this Court's regulatory takings decisions issued since *Penn Central* have dealt with various types of personal property, not one of those cases has addressed the issue of the denominator or the "relevant parcel." While these cases do address the economic impact prong of *Penn Central*, they do so without ever mentioning the issue of the denominator or the "relevant parcel" -- thus leaving the lower courts to guess whether the same denominator standards applicable to real property (whatever they may be) are equally applicable to personal property, or whether an entirely different approach

to measuring economic impact is required when personal property is involved.

For example, in *Brown v. Legal Foundation*, 538 U.S. 216, 234 (2003), the Court found no economic impact on the plaintiffs by a requirement that interest generated from a mandatory deposit into lawyers' trust accounts be used to fund legal programs for the indigent, but did so without even indicating what it regarded as the "relevant parcel" -- or indeed whether the concept of "parcel" was relevant to its analysis. Similarly, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980), this Court found a compensable taking of private interpleader funds deposited in county courts, but did so without reaching questions of economic impact or "relevant parcel."

The same is true of the Court's cases touching on such non-real property topics as pension benefits, intellectual property rights, and the prohibition of the sale of endangered bird parts. In none of these cases has the Court mentioned the relevant parcel/denominator question in assessing a regulation's economic impact. *See, e.g., Concrete Pipe and Prods. of Cal. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993) (conducting *Penn Central* analysis to determine economic impact of withdrawal liability for leaving pension plan but not defining denominator for analysis); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004-14 (1984) (determining whether disclosure of trade secrets constitutes a regulatory taking but not discussing economic impact); *Andrus v. Allard*, 444 U.S. 51, 66-67 (1979) (discussing economic impact of federal laws prohibiting sale and possession of certain bird parts on property owners but not discussing specific denominator context in which to view the loss of property rights).

These cases beg the question of the context in which the loss of these personal property rights should be viewed. In *Concrete Pipe*, should a court look at the withdrawal liability

against the denominator of the total shares in the pension plan or against the assets of the company? In *Monsanto*, should the claimant's trade secrets be viewed against the denominator of the remaining (if any) trade secrets, the intellectual property wing of the company, or the assets of the company as a whole? In *Andrus*, should the prohibition in bird parts be analyzed in relation to the remaining functional and commercial use of the bird parts (as the Court appeared to suggest) or against the overall resources of an individual property owner? Or is the whole concept of a "parcel" or a "denominator" irrelevant to a takings claim involving personal property? And if the concept of the "parcel" is irrelevant in personal property cases, how should the courts determine whether the economic impact is sufficient to constitute a taking? For example, the petitioner in *Brown* was owed $4.96 in interest on his lawyers' trust account. 538 U.S. at 229. In contrast, Rose Acre's claim reaches millions of dollars.

In the absence of guidance from this Court, most recent lower court decisions involving claims of regulatory takings of personal property have simply skipped past the parcel/denominator issue. *See, e.g., Paradissiotis v. United States,* 304 F.3d 1271, 1276 (Fed. Cir. 2002) (determining whether government prohibition on exercise of certain stock options by Libyan agent was a regulatory taking); *Brubaker Amusement Co. v. United States,* 304 F.3d 1349, 1358 (Fed. Cir. 2002) (discussing challenges to Food and Drug Administration's regulations regarding sale of cigarettes and smokeless tobacco from vending machines as regulatory taking); *United States Fid. & Guar. Co. v. McKeithen*, 226 F.3d 412, 416 (5th Cir. 2000) (addressing whether Louisiana legislation changing method of assessing an insurer's annual contributions to a workers' compensation fund was a regulatory taking); *US West Communications, Inc. v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1126 (9th Cir. 1999)

(dismissing on ripeness grounds local phone exchange carrier's claim that state utility commissions' arbitration terms constituted regulatory taking); *Puerto Rico Tel. Co. v. Telecommunications Regulatory Bd.*, 189 F.3d 1, 16-18 (1st Cir. 1999) (involving a telephone company's regulatory takings-based challenge to local regulatory decision mandating refund to company's customers); *Meriden Trust & Safe Deposit Co. v. FDIC*, 62 F.3d 449, 454-55 (2d Cir. 1995) (discussing whether Federal Deposit Insurance Company's finding that state bank and trust company was cross-liable under federal law for liabilities of commonly controlled insured institution was regulatory taking); *Yancey v. United States*, 915 F.2d 1534, 1540-41 (Fed. Cir. 1990) (finding Fifth Amendment taking of turkeys affected by government quarantines); *Mibbs, Inc. v. South Carolina Dep't of Revenue*, 524 S.E.2d 626, 628 (S.C. 1999) (discussing whether county's ban on cash payouts from video poker machines constituted a regulatory taking); *US West Communications, Inc. v. Public Utils. Comm'n*, 505 N.W.2d 115, 126-27 (S.D. 1993) (stating that public utilities commission's deprivation of telephone company's right of its own facilities to haul telephone traffic constituted regulatory taking).[7] These courts' "unexplained assumptions" about the "relevant parcel" fail to present a legal rationale for takings determinations and undermine the Fifth Amendment's

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[7] One commentator has noted that "[t]ypically, a court overlooks the problem of identifying the relevant parcel . . . because . . . the court makes unexplained assumptions about the dimensions of the parcel and then immediately shifts its attention to the economic analysis." Laura M. Schleich, *Takings: The Fifth Amendment, Government Regulation, and the Problem of the Relevant Parcel*, 8 J. Land Use & Envtl. L. 381, 395, 402 (1993) (proposing "moment of regulation" alternative to relevant parcel analysis).

protection against individuals bearing public burdens that "in all fairness and justice . . . should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49. Given the proliferation of government regulatory actions affecting property other than real estate, regulatory takings claims arising from such actions on the part of both the federal and the state governments are bound to continue and even to increase -- thus highlighting the need for this Court to address this issue in the personal property context.

In the case at bar, the Federal Circuit recognized that the "methodologies used to determine how much of an affected owner's property constitutes the relevant 'parcel' in real estate takings cases are not, of course, directly applicable to a case such as the present," involving personal property. *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1186 (Fed. Cir. 2004). Nevertheless, it rejected the lower court's use of a Government Conduct approach, as well as each of the alternative theories propounded by the claimant -- including an alternative theory specifically designed for situations involving personal property. *Id.* at 1186-88 (discussing Rose Acre's definition of the "relevant parcel"). Therefore, the Court concluded that, as a matter of law, it was required by this Court's decisions in *Penn Central* and *Keystone* (both real property cases) to apply a "parcel as a whole" concept in which the denominator consists of all the eggs produced on all three farms owned by Rose Acre that had been affected by the regulations at issue. Pet. Br. 14-15.

The Federal Circuit thus took a concept derived from real property cases and applied it to a personal property context in which it makes no sense. Under that court's extreme version of a "common ownership" approach, the existence of a compensable taking of discrete items of personal property would depend on the size of the claimant's overall business. Thus, as applied to the government regulations here at issue, a small egg producer, with all of its affected chicken houses

located on a single farm, who suffered precisely the same financial loss from the effects of the same Government actions on precisely the same number of eggs produced in the same number of houses, would have sustained a compensable taking and been entitled to the $6 million judgment awarded by the trial court. On the other hand, solely because it is a large producer with numerous chicken houses scattered over multiple farms, Rose Acre will apparently be denied any compensation whatsoever. This result flies in the face of the concept of equality of treatment under the law that lies at the heart of our constitutional jurisprudence.[8]

At this stage of the proceeding, an exhaustive analysis of the relative merits of the various approaches to the parcel/denominator that have been developed to date by the lower courts -- along with other potential approaches to performing the economic impact analysis required by *Penn Central* -- is unnecessary and perhaps even inappropriate. The key point is simply that there is an urgent need for this Court to address the issue, so as to give the lower courts the guidance they so plainly need.

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[8] *See* John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. Cal. L. Rev. 1003, 1031 (2003) (noting that the amount of property an owner has should not define the denominator and ultimately, the case in its entirety).

CONCLUSION

For the reasons stated herein, the petition for certiorari should be granted.

Respectfully submitted,

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